

**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF LOUISIANA**

In re  
**THOMAS CARROL CALEGAN**  
DEBTOR

BANKRUPTCY NO.  
**01-15474**  
SECTION "B"

CHAPTER 7

**CLAUDE C. LIGHTFOOT, JR.**  
**CHAPTER 7 TRUSTEE**  
PLAINTIFF

**ADVERSARY NO.**  
**03-1274**

VERSUS

**KELLI S. CALEGAN**  
DEFENDANT

**MEMORANDUM OPINION**

This matter went to trial on May 25, 2004 on the trustee's complaint seeking to avoid the transfer of certain property of the debtor, Thomas Carrol Calegan, to the defendant, Kelli S. Calegan, under 11 U.S.C. § 549 and to recover such property under § 550. For the following reasons, the court finds that the transfer of the cash property constitutes an avoidable post-petition transfer of property of the bankruptcy estate and shall be recovered in part by the trustee.

## **I. FACTUAL BACKGROUND**

The debtor, now deceased, was the holder pre-petition of a promissory note by and between him and the defendant, his daughter, in the amount of \$ 35,000, secured by a mortgage on Unit 2311 of the Parc Fontaine Condominiums in New Orleans, Louisiana. On August 16, 1999, the mortgage was duly recorded in the Orleans Parish public records.

On July 6, 2001, the debtor filed for Chapter 11 bankruptcy relief. On October 4, 2002, the case was converted to a Chapter 7 case. Mr. Lightfoot was appointed trustee.

On February 27, 2003, the debtor executed before a notary public a document entitled "Affidavit of Lost Note to Cancel Mortgage," affirming therein that the defendant had satisfied such note on or about February 13, 2003, and that the mortgage should be released. The defendant, however, had not paid the outstanding balance. Subsequently, the defendant used the condominium as collateral for a new mortgage note with Bank One. As a result, she received \$25,435 in cash proceeds. The defendant used \$12,379.01 to pay off the outstanding lien balance on her 2002 Jeep Wrangler. She used the remaining cash to pay off other debts and unrelated legal fees.

The trustee requests that the court enter an order avoiding the transfer and allowing the recovery of the transferred property for the estate. He also asks the court to require the defendant to turn over her Jeep to the estate.<sup>1</sup>

According to her post-trial memorandum, the defendant does not object to the court voiding the transfer and allowing the property to be recovered to the estate. Rather, she only objects to being ordered to turn over her Jeep.<sup>2</sup>

## **II. LEGAL ANALYSIS**

The court has jurisdiction over this core proceeding under 28 U.S.C. §§1334 and 157(b)(2)(A), (E), (F), and (H).

Under the pertinent parts of 11 U.S.C. §549(a), a trustee may avoid a transfer of estate property that occurs post-petition and is not authorized under the Bankruptcy Code or by a court. In this case, the bankruptcy case was filed on July 6, 2001, and the transfer occurred on February 27, 2003. Thus it was a post-petition transfer. The transfer was unauthorized because neither the court nor the trustee permitted it. Consequently, the evidence shows, and the defendant does not dispute the fact, that the requirements of §549(a) have been met.

Section 550 of Title 11 of the United States Code addresses the transferee's liability when there has been an avoided transfer. Subsection (a) states that,

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<sup>1</sup> P. 1.

<sup>2</sup> P. 15.

[e]xcept as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, . . . of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made . . . .<sup>3</sup>

The defendant does not challenge the fact that she is the “initial transferee”<sup>4</sup> of the proceeds from the cancelled mortgage. Nor does she dispute the trustee’s right to recover the transferred cash property under §549. The only matter at issue is whether the defendant must turn over her Jeep to the trustee under §550.

Where, as here, an initial transferee converts property received in an avoidable transfer, the court has discretionary power to decide whether the trustee may recover the actual property or its value from the transferee.<sup>5</sup> The Code does not provide guidelines to help the court decide whether to permit the recovery of the property itself or the value.<sup>6</sup> In making such determinations, however, courts consider whether the property is recoverable, whether the property has diminished in value by virtue of depreciation or conversion, whether there is conflicting

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<sup>3</sup> 11 U.S.C. § 550.

<sup>4</sup> Neither the Bankruptcy Code nor the legislative history defines *initial transferee*. Generally, in deciding whether a party is an initial transferee, courts apply the common definition – “the party who receives a transfer of property directly from the debtor” – to the party at issue. *In re Incomnet, Inc.*, 299 B.R. 574, 578 (9<sup>th</sup> B.A.P. 2003); *In the Matter of Criswell*, 102 F.3d 1411, 1418 (5<sup>th</sup> Cir. 1997).

<sup>5</sup> See *Davis v. Davenport*, 147 B.R. 172 (Bankr. E.D. Mo. 1992); *Halverson v. Le Sueur St. Bank (In re Willaert)*, 944 F.2d 463, 464 (8<sup>th</sup> Cir. 1991).

<sup>6</sup> See *In re Centennial Textiles, Inc.*, 220 B.R. 165, 176-77 (Bankr. S.D.N.Y. 1998).

evidence as to the value of the property, and whether the value of the property is readily determinable and a monetary award would result in a savings to the estate.<sup>7</sup>

The intent of §550 is to restore the estate to the financial condition it would have enjoyed if the transfer had not occurred.<sup>8</sup> Thus, the trustee is only allowed to recover property that belonged to the estate as of the debtor's filing date.<sup>9</sup> Property of the estate includes only the debtor's equity in the property.<sup>10</sup>

Considering the facts at hand, the court in its discretion finds that the intent of §550(a) is best served by requiring the defendant to return to the trustee the entire \$25,435 she received, but not to turn over the Jeep. The defendant's Jeep is a depreciating asset that is worth less today than on the day she paid off her lien. By repossessing her car, the court would not be serving the best interest of the estate, as its order would impede the defendant's ability to earn a living and in turn, repay any of the proceeds. In short, the court finds that ordering her to repay the monetary proceeds she originally received, and not to turn over the Jeep, will result in a better monetary reward to the estate.

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<sup>7</sup> 15 Collier on Bankruptcy ¶ 550.02[3][a], 550-10, citing *Centennial Textiles*, 220 B.R. at 177, *In re Classic Drywall, Inc.*, 127 B.R. 874, 877 (Bankr. D. Kan. 1991).

<sup>8</sup> 15 Collier ¶ 550.02[3], 550-9, citing *In re Acequia, Inc.*, 34 F.3d 800, 812 (9<sup>th</sup> Cir. 1994); *Feltman v. Warmus (In re American Way Serv. Corp.)*, 229 B.R. 496, 530-31 (Bankr. S.D. Fla. 1999); *Aero-Fasterner, Inc. v. Sierracin Corp. (In re Aero-Fasterner, Inc.)*, 177 B.R. 120, 139 (Bankr. D. Mass. 1994).

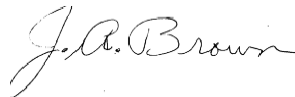
<sup>9</sup> 11 U.S.C. § 541. See *In re Bean*, 252 F.3d 113, 117 (2d Cir. 2001).

<sup>10</sup> *Bean*, 252 F.3d at 117, citing *In re Mahendra*, 131 F.3d 750, 755 (8<sup>th</sup> Cir. 1997); *United States v. Rauer*, 963 F.2d 1332, 1337 (10<sup>th</sup> Cir. 1992)

### **III. CONCLUSION**

Thus, for the reasons stated herein, the court finds that the cash proceeds in the amount of \$25,435 paid to the defendant are avoidable under §549 and recoverable by the trustee under §550. An order will be issued accordingly.

New Orleans, Louisiana, July 12, 2004.

A handwritten signature in cursive script, reading "J. A. Brown".

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JERRY A. BROWN  
BANKRUPTCY JUDGE